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81-2223

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ROBERT E. KELTNER,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH DISTRICT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Federal District Court and the United States Court Of Appeals For The Fourth Circuit Err in refusing to permit the Defendant to offer evidence for the purpose of proving that he had no tax liability when he filed the return for the Calendar Year 1972 on March 22, 1974, for the reasons of the Sub-Chapter S Corporation losses?

2. Did the Federal District Court and the United States Court Of Appeals For The Fourth Circuit Err in denying the Defendant the right to prove by evidence that he had no tax liability for the year 1973 at the time of the filing of the return on July 4, 1975, because of the existence of the Sub-Chapter S Corporation losses?

3. Did the Federal District Court and the United States Court Of Appeals For The Fourth Circuit Err in holding that the Summary Witness, BAYHA'S, erroneous summary exhibit did not prejudice the Defendant as a matter of law?

4. Did the Federal District Court and the United States Court Of Appeals For The Fourth Circuit Err in holding that BAYHA'S commentary upon the Sub-Chapter S Corporation returns was relevent when the accuracy of the returns was not in issue and the Defendant was not permitted to use the returns to prove that no tax liability was existent at the time of the filing of each return?

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court Of Appeals For The Fourth Circuit entered on APRIL 5, 1982.

CITATIONS TO OPINION BELOW

The Opinion of the Fourth Circuit, United States Court Of Appeals, is reported at _____ F. 2d _____, No. 80-5100.

JURISDICTION

Petitioner was indicted by the Federal Grand Jury For The Northern District of West Virginia, in February, 1980, charging Petitioner with a count of Income Tax Evasion by filing a false and fraudulent return on MARCH 22, 1974, for the year 1972, in violation of

Section 7201 of the Internal Revenue Code; 26 U. S. Code, Section 7201, and

In Count Two, of filing a false and fraudulent return on July 4, 1975, for the year 1973, in violation of 26 U.S. Code, Section 7201, both counts of the indictment charged the violations as being committed in the Northern District of West Virginia.

The Petitioner was convicted of both counts by a jury verdict and appealed to the Fourth Circuit, United States Court Of Appeals. The case was argued before Chief Judge, WINTER, and Circuit Judges, PHILLIPS and MURNAGHAN. A Published written Opinion unfavorable to the Petitioner was handed down on April 5, 1982.

The jurisdiction of the Supreme Court of the United States is invoked pursuant to

U.S. Code, Section 1256, (1), the case having been declined by the Fourth Circuit, United States Court Of Appeals.

STATUTORY PROVISIONS

Internal Revenue Code, Title 28, Section 7201, provides:

> "That any person who wilfully attempts in any manner to evade or defeat any taxes invoked by this Title or the payment thereof shall... be guilty of a felony..."

The foregoing statutory offense is the one which the Petitioner stands convicted of violating in both Counts of the indictment.

Internal Revenue Code, Title 26, Section 7203, provides:

"That a person who willfully fails to file a return shall be guilty of a misdemeanor and upon conviction thereof shall be fined and imprisoned."

Internal Revenue Code, Title 26, Section 172, as amended, provides for net operating loss to be deducted and further provides:

"(a) Deductions allowed. -- There shall be allowed as a deduction for the taxable year an amount equal to the aggregate (1) of the net operating loss carrybacks to such year. ..." .

(b) A net operating loss carryback for any taxable year ending after December 31, 1953, shall be "a net operating loss carryback to each of the 2 taxable years preceding the taxable year of such loss. ...". (now 3 years by amendment).

Internal Revenue Code, Title 26, Section 1374 (a) et. seq., provides for the computation of net operating losses.

Internal Revenue Code, Title 26, Section 2066, provides:

"Section 2066. Computing the net operating loss. The Corporation's net operating loss is computed in the usual way with this exception: The same special deductions for corporations relating to partially tax exempt interest and dividends received which are restored to the corporation's income in determing its taxable income are not allowed in computing the net operating loss. See: Section 2055.

The shareholder's share of the corporation's net operating loss is computed on a daily basis. Thus where a shareholder transfers shares during the year,

he is still allowed his share of the loss up to the day before the transfer takes place. The loss for the day of transfer belongs to the transferee."

This entire matter is covered by Internal Revenue Code Section 1374 (a), Section 1374 (b), and Section 1374 (c-1) and (c-2).

Then further reatment 33 Am Jur 2d, 480 provides:

"Section 2067. Operating Loss Carrybacks. A net operating loss incurred by a pseudo corporation cannot be carried forward or back either to another year for which an election is in effect or to a non-election year. The loss belongs to the stockholder."...

Internal Revenue Code, Title 28, Section

1372, provides for the election of a Sub-Chapter S Corporation after December 31, 1957.

Internal Revenue Code, Title 28, Section 1374, provides that the shareholder of a Sub-Chapter S Corporation has deductions which are limited on the basis of his stock.

STATEMENT OF THE CASE

The Defendant, ROBERT E. KELTNER, was indicted by the Grand Jury of the Northern District of West Virginia, in the Spring of 1980, in a Two Count Indictment.

The First Count alleges the filing of a false Income Tax Return for the year 1972, on March 22, 1974.

The Second Count in the Indictment alleges the same offense and charges that it occurred on JULY 4, 1975.

The Defendant undertook to present the defense that there was no tax liability for the year 1972 at the time of the filing in March of 1974, and to the Second Count of the Indictment that there was no tax liability at the time of the filing for 1973 in July of 1975. (Observe that the criminal act alleged is the filing of a false return in each Count).

The transaction which gave rise to the defense was the Defendant's acquisition of a Sub-Chapter S Corporation in the Fall of 1973, before the alleged criminal act. (The Sub-Chapter S Corporation was UNITED INNKEEPERS, INC., a Florida Corporation).

The UNITED INNKEEPERS Corporation was a Sub-Chapter S Corporation before the Defendant purchased one hundred (100%) per cent of the stock of this Corporation and after

issuance of the stock the Defendant made the required Sub-Chapter S Corporation election seasonably and continued operation as a Sub-Chapter S Corporation (UNITED INNKEEPERS) until after all pertinent and material times involved in this litigation, which was recognized and accepted by the Government.

Specifically, in August of 1973, KELTNER negotiated with one YANNI to purchase UNITED INNKEEPERS which owned and operated a large motel at Lake City, Florida. KELTNER took over the Corporation a short time later and the exact date of the take over was the subject matter of some modest dispute between YANNI and KELTNER.

There were losses which became Net Operating Losses for the year 1973-1974 and here it should be observed that the fiscal year of UNITED INNKEEPERS ended August 31, 1973, and just thereafter KELTNER took over the Corporation.

Losses developed, all of which are categorized as Net Operating Losses and the losses continued until the time of the filing of the 1972 Return on MARCH 22, 1974.

The losses continued throughout 1974 and 1975 until the 1973 Return was filed on the 4th day of July, 1975, and continued thereafter.

In March of 1974, the Defendant had at least Sixty-six Thousand ($66,000.00) Dollars of net operating loss to apply to the 1974, 1971, 1972, and 1973 income tax liability as losses and he knew of this loss as of March of 1974.

This nonreversible trend continued through all of 1974 and 1975.

Note that the 1972 Return was filed March 22, 1974, when the Defendant had experienced the losses of the Sub-Chapter S Corporation

at least three (3) months of 1973, and January, February, and through March 22, 1974. In addition, YANNI had converted Twenty-two Thousand ($22,000.00) Dollars from the Sub-Chapter S Corporation during the last few months of 1973, after the sale to KELTNER, and this was known to the Defendant, thereby causing an additional Twenty-two Thousand ($22,000.00) Dollar loss for the Defendant, KELTNER, in 1973.

The Sub-Chapter S losses were all losses of the individual Defendant, actually beginning the Fall of 1973 and continuing thereafter.

And, as of MARCH of 1974, these losses were in excess of SEVENTY-FIVE THOUSAND ($75,000.00) DOLLARS inasmuch as September, October, November, December, January, and February losses were at the rate of ELEVEN THOUSAND ($11,000.00) DOLLARS per month, and the TWENTY-TWO THOUSAND ($22,000.00) DOLLAR conversion of funds had been by YANNI after he sold

the Corporation the Defendant taxpayer. This does not include the ELEVEN THOUSAND ($11,000.00) DOLLAR MARCH loss of 1973. The Internal Revenue Code provides for losses to be applied to the Tax Year, carried back three (3) years, and then applied in a Carry Forward Manner thereby covering the years 1971 through 1973. Further discussion of this Internal Revenue Code provision will follow.

At the time of the filing of the 1973 Return, July 4, 1975, the Sub-Chapter S Corporation's Fiscal Year 1973-1974 had ended August 31, 1974, and the last four (4) months of 1974 had elapsed and six (6) months of 1975. Net Operating Losses for the Sub-Chapter S Corporation continued through 1975.

The Defendant's trial was conducted without a distinction being made as to the Fiscal Year of the Sub-Chapter S Corporation ending in AUGUST of 1974. (UNITED INNKEEPERS).

Otherwise stated, the Sub-Chapter S Corporation's losses were complete and unequivocally existent as of August 31, 1974, and were losses of the Defendant taxpayer in filing the returns for the Calendar Year 1973, and the Calendar Year 1972.

Clearly, on MARCH 22, 1974, and on JULY 4, 1975, the time of the filing of the two (2) returns respectively, the Sub-Chapter S Corporation's losses had occurred, and as of August 31, 1974, the Fiscal Year ended and the losses were final, unequivocal, and were both known and existent for many months.

Internal Revenue Code Title 26, Section 7201, provides:

> "That any person who wilfully attempts in any manner to evade or defeat any taxes invoked by this Title or the payment thereof shall ... be guilty of a felony...".

Count One of the Indictment charges violation of the preceding Section by filing a false and fraudulent Income Tax Return on MARCH 22, 1974, for the Calendar Year 1972, and then Count Two makes the same allegations and states that the offense was committed July 4, 1975, for the year 1973.

All of the cases agree that conviction requires that there be proof of tax liability over and above the reported tax as an element of the crime. That is, the Government must prove additional tax liability over and above that reported.

The cases also agree that the offense is not committed until the actual time of filing the false return.

At the time of filing there were no taxes due if the Sub-Chapter S Corporation losses were permitted as a carryback and the Defendant was not permitted to prove that no taxes were due.

The taxpayer should be given ever favorable benefit arising out of the evidence up to the time of the alleged fraudulent act. That is, he should be given the benefit of all events which are favorable to him. This proposition is supported by Spies vs. U.S., 317 U.S., 492, 63 S. Ct., 364, cited in Willingham vs. U.S., 289 F. 2d. 283, Koontz vs. U.S., Fifth Circuit, 277 F. 2d. 53 (1972),

Internal Revenue Code, Section 1374 (a), Section 1374 (b), Section 1374 (c-1), and Section 1374 (c-2), provide for the matters involved in this litigation concerning operating loss carrybacks, etc.

Also, Internal Revenue Code, Section 2067, provides:

> "A net operating loss incurred by a pseudo corporation cannot be carried forward or back either to another year for which an election is in effect or to a

non-election year. The loss belongs to the stockholder."...

In this instance, the stockholder being the Defendant, ROBERT E. KELTNER.

Both the Trial Court and the United States Court Of Appeals For The Fourth Circuit has held that the criminal conduct on the part of the Defendant consisted of filing a Return late and has taken the position that the tax liability became fixed at the closing of the Calendar Year for which the inaccurate Return was filed. This is contrary to law inasmuch as all of the cases recite that there must be additional tax liability due at the time of the filing of the alleged false and fraudulent return because the criminal act occurs at the time of the filing of the false return and if no false return is filed there is no criminal act other than the misdemeanor for non-filing. Internal Revenue Code, Section 7203.

The Trial Court and the Appellant Court ruled that the Defendant was prohibited by law from showing that no additional taxes were due at the time of the late filing even though this was the time of the alleged criminal act. The alleged criminal act being that of understating income fraudulently. The Court, in fact, ruled that the Sub-Chapter S. losses were not losses which the Defendant could prove in order to show that there was in fact no tax liability at the time of the filing. The Appellant Court acknowledged that it might be that in the Second Court of the Indictment this was a valid defense, but then saw fit to do nothing in the way of relief for the Defendant. The theory of excluding the evidence of no tax liability is predicated upon the fact that the losses occurred after the end of the Calendar Tax Year. It should be observed that the Defendant is not charged

with committing a crime at the end of the Calendar Year, but at the time of the filing one and one-half (1-1/2) years later. The time and method of tax fraud alleged in the Indictment is the filing of the fraudulent return.

The Court instructed the jury concerning the evidence in this matter and this emphasized the fact the Calendar Year was one thing and the alleged criminal conduct was another thing.

The Trial Court erroneously in its charge stated to the jury, "you have heard evidence of some evidence or reference of net operating losses sustained by the Defendant's Sub-Chapter S Corporation for the years subsequent or after 1972 and 1973. Again, I instruct you that the evidence of subsequent years net operating losses may not be considered in determing whether there was an additional tax due and

owing by the Defendant for the years 1972 and 1973...".

The evidence was that there were net operating losses during 1973 and not the year 1974 before the tax returns were filed and clearly this is erroneous because the statute provides for a pro rata application of losses by a taxpayer.

Again, the Court charged the jury, "...the defense theory is making similar computations that the true taxable income was as disclosed on the Defendant's tax return."...

This is erroneous and the tax returns involved are not singled out by the Trial Court and the Defendant's position is not that the tax returns for the years 1971 and 1972 were accurate at the time filed, but that later tax returns and later evidence shows that no taxes were in fact due.

Further, the Trial Court charged the jury that the Government must prove "that substantial income tax was due and owing from the Defendant for the calendar years in question, either 1972 or 1973, or both, and in addition to that declared on his income tax return for that particular year or years".

This is erroneous because it completely eliminates from consideration the fact that the returns filed, which constituted the basis for the charge were filed in 1974 and 1975.

Again, the Trial Court charged the jury, "we are talking about gross income. Gross income to an individual is generally all gains and profits or profits and income of whatever kind and wherever from payment or derived from any source whatsoever."...

And the gross income is not a part of the Government's case and tax liability is the issue and the misleading statement about

about loss income is entirely erroneous, misleading and confusing and, further, it is incomplete because it fails to take into consideration net operating losses and any deductions to which the Defendant is entitled.

Next the Trial Court charged the jury, "That income tax evasion involved some act or acts of the Defendant wilfully done in furtherance of the intent to evade.".

The Indictment charges evasion by filing a false return and in a different type of attempt and the Trial Court's instruction in this regard broadens the possibility of conviction.

The Trial Court properly instructed the jury that the Government had to prove that there was tax liability at the time of the commission of the alleged offense, and the Government undertook to establish this burden

that there was a tax liability at the time of the alleged offense by placing in evidence all of the tax returns and the Defendant was denied the right to prove that there was no tax liability. The tax returns does prove the losses of the Corporation, but the Defendant was not permitted to use the tax returns for this purpose.

Further, the Defendant was not permitted to prove that the losses were real and existent in 1973, 1974, and 1975.

Particularly, the Trial Court failed to rule that the crime occurred because the Defendant did not file a 1972 return and then filed a 1973 return undertaking the report of losses and carrying them back to 1972. This rationale ignores the fact that the 1972 return was filed almost a year late and the 1973 return was filed more than a year late. Late filings

are misdemeanor offenses and are not involved in this litigation.

The Defendant insists that he was prejudiced by the Government's Summary Chart and the erroneous entries thereon and even though corrections were made this does not eliminate the prejudice accomplished by the use of the erroneous charts and it would seem that there would be no way that the Defendant could prove that he was prejudiced with the jury and, in fact, this type of evidence could be nothing but prejudicial.

The Defendant objected to the commentary of the Summary Witness, BAYHA, in gratuitously questioning the UNITED INNKEEPERS, INC.'S income tax returns and suggesting the probability of irregularity.

The Defendant was permitted to offer this evidence to show, under the Court's

limitations, that he did not believe that there was tax liability. Curiously enough, the Appellant Court states that this testimony is relevant and material because the Defendant claims that there was no tax liability, but it does not consider of the fact that the Trial Court did not permit the Defendant to prove that there was in fact no tax liability.

This rationale seems to be sophistry.

In short, the Defendant was not permitted to show that he did not have a tax liability, but the Government was permitted to claim that his report was inaccurate when it was admitted for the limited purpose of proving absence of intent.

An Appeal to the United States Court Of Appeals For The Fourth Circuit was filed. The case was presented in December of 1981, and an adverse ruling was made by WINTER, Chief Judge, and PHILLIPS and MURNAGHAN, Circuit

Judges, a Published written Opinion was submitted April 5, 1982. There is attached hereto and made a part hereof by specific reference said written Published Opinion.

The Appellant Court also relies upon the provisions of the Code of Federal Regulations which are enunciated as 1981 provisions, and it would seem that the Regulations which are attributable to Internal Revenue interpretation procedures are somewhat less than binding authority inasmuch as Internal Revenue Service is in truth and in fact the real Plaintiff in this action.

The Appellant Court also relies heavily upon the Code of Internal Revenue Deficiency Assessment Procedures and cites as authority the case of Manning v. Seely Tube & Box Co., 338 U.S. 561 (1950). This case involves an assessed deficiency in which it merely states that the taxpayer had a positive obligation

to the United States to pay taxes. This is a far cry from the current criminal case in which the Defendant was denied the right to prove that there was no tax liability because of his Sub-Chapter S losses.

Further, the Appellant Court rationalized that the Defendant is guilty of tax evasion by filing a false return because he had a duty to file and declare taxes at the end of the Calendar year, which rationale is a tenuous bit of reasoning. It should be observed that there is not involved in this action penalty for deficiency. This case involved an alleged false and fraudulent tax return and nothing more.

The concern about opportunity for abuse seems somewhat less than persuasive inasmuch as each citizen and taxpayer is entitled to rely upon the statutory provisions of the

Federal Government. In further pursuit of the tax class theory as distinquished from proof of a criminal offense, the Appellant Court adopts the "lucky loser alliteration". The Willingham case from the Fifth Circuit did not involve existing losses at the time of filing, which filing was alleged to be fraudulent.

REASONS FOR GRANTING THE WRIT

The Federal District Court and the United States Court Of Appeals For The Fourth Circuit were in err in refusing to permit the Defendant to offer evidence for the purpose of proving that he had no tax liability when he filed the return for the Calendar Year 1972 on March 22, 1974, for the reasons of the Sub-Chapter S Corporation losses,

The Federal District Court and the United States Court Of Appeals For The Fourth Circuit were in err in denying the Defendant the right to prove by evidence that he had no tax liability for the year 1973 at the time of the filing of the return on July 4, 1975, because of the existence of the Sub-Chapter S Corporation losses;

The Federal District Court and the United States Court Of Appeals For The Fourth Circuit were in err in holding that the Summary Witness, BAYHA'S, erroneous summary exhibit did not prejudice the Defendant as a matter of law;

The Federal District Court and the United States Court Of Appeals For The Fourth Circuit were in err in holding that BAYHA'S commentary upon the Sub-Chapter S Corporation returns was relevant when the accuracy of the returns was not in issue and the Defendant was not permitted to use the returns to prove that

no tax liability was existent at the time of the filing of each return.

The case of Willingham v. United States, 289 F. 2d 283 (5th Cir. 1961) enunciates that the Defendant is entitled to any and all deductions favorable to him existent at the time of the alleged false filing.

As further authority that the Defendant should be given all of the benefits arising out of the events up to the time of filing of the return, the case of Spies v. U.S., 317 U.S. 492, 63 S. Ct. 364, and Goo v. U. S. Ninth Circuit, 187 F. 2d 62, certiorari denied 341 U.S. 916, 71 S. Ct. 735, 95 L. Ed. 1351, along with the cases there cited are urged as authority for the proposition that the Defendant should be allowed to prove the absence of liability at the time of the offense. That is, the filing date.

It would seem that the statutes, Internal Revenue Code, Section 172, and Internal Revenue Code 1374, gives the Defendant the right to have the net operating loss carryback which is conferred upon the Defendant by statutory enactment and not Internal Revenue Codes or other optional permissible regulations.

C O N C L U S I O N

As indicated by the above statutes and cases, it would seem that the Trial Court and the Appellant Court failed, at the least, to distinquish between the First Count and the Second Count in the Indictment and that the Defendant was not given the benefit of existing tax facts existing at the time of the alleged criminal offense in filing the 1972 return in 1974 and the 1973 return in 1975.

The proper determination of the issues submitted to the Supreme Court of the United

States authoritatively enunicate what seems to be a split between the Circuits in that the Fourth Circuit apparently declines to give the Defendant the benefit of all facts favorable to him at the time of the alleged false and fraudulent filing and declines to permit the Defendant to have the benefits of the statutes concerning Sub-Chapter S Corporations and carryback losses.

Further, it should be observed that the Federal Tax Laws are being changed almost annually and benefits are being originated by the new statutes and the courts seem to adhere to old rulings and decline to give benefits obviously intended by the new enactments.

WHEREFORE: Petitioner requests that the Supreme Court of the United States issue a Writ Of Certiorari to the Fourth Circuit, United States Court Of Appeals, to review the decision of that Court in this matter.

ORVILLE L. HARDMAN, Counsel for
PETITIONER, ROBERT E. KELTNER.

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A P P E N D I X

a 1

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

PUBLISHED

NO.: 80-5100

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT E. KELTNER,

Appellant.

Appeal from the United States District Court For The Northern District Of West Virginia, at Parkersburg. Charles H. Haden, II, District Judge.

Argued: December 11, 1981 Decided: April 5, 1982

Before WINTER, Chief Judge, PHILLIPS and MURNAGHAN, Circuit Judges.

Orville L. Hardman for Appellant; R. Russell Mather, Tax Division, Dept. Of Justice (Stephen G. Jory, United States Attorney; John F. Murray, Acting Assistant Attorney General; Michael L. Paup, Robert E. Lindsay, Tax Division, Dept. Of Justice on brief) for Appellee.

MURNAGHAN, Circuit Judge:

Appellant Robert Keltner was charged by a federal grand jury onJanuary 25, 1980, with two counts of willfully attempting to evade his federal income taxes for the calendar year 1972 and the calendar year 1973, in violation of 26 U.S.C.§ 7201, by filing false and fraudulent returns for those years. At trial the government used the net worth and personal expenditures methods of proof to show that appellant, an attorney, had received taxable income of $20,746.50 in 1972 and $111,547.85 in 1973, upon which there were taxes due of $6,063.51 and $62,037.50. His 1972 return, due April 15, 1973, but filed on March 22, 1974, reported a loss for tax purposes of $922.82 and no tax liability, although he inexplicably paid taxes of $196.75 for that year.

His 1973 return, due April 15, 1974, but filed on July 4, 1975, reported taxable income of $2,376, and a tax liability of $792. According to the government's evidence, appellant had understated his tax liability by $5,866.56 in 1972, and $61,245.50 in 1973.

Appellant argued that he was entitled to additional deductions, not claimed on his returns, for net operating losses sustained by United Innkeepers, Inc., a Subchapter S corporation which he purchased in September, 1973. The informational return for the fiscal year ending August 31, 1974, due November 15, 1974, and filed by United Innkeepers onJanuary 1, 1976 showed a net operating loss of $90,840.12, and the 1975 and 1976 returns, filed on April 17, 1980, and due respectively on November 15, 1975 and November 15, 1976, showed net operating losses of $86,606.70 and $63,744.47. He argued that the losses

could be carried back to 1972 and 1973, thereby eliminating any tax liability for those years.

The district court denied appellant's pretrial motion for acquittal and ruled that the evidence of United Innkeepers' losses could be admitted only to show appellant's lack of specific intent. After a jury trial appeallant was found guilty on both counts, and the district court sentenced him to two concurrent five year sentences and fined him $10,000.

Appellant contends that the district court should have permitted him to establish as a defense that, because of the net operating losses, he had no tax liability for 1972 or 1973. Additionally, he argues that the testimony of the government expert and the summary chart on which he relief should not

have been admitted into evidence.

I.

Appellant's argument relies heavily on the following sequence of events: in September, 1973, Keltner purchased United Innkeepers; on March 22, 1974, he filed his 1972 return; and on July 4, 1975, he filed his 1973 return. The returns were no fraudulent, he contends, because at the time they were filed he had, in fact, already incurred net operating losses which could be carried back, pursuant to 26 U.S.C.§ 172, to eliminate any tax liability for 1972 and 1973.

It is uncontested that, in order to convict a defendant of tax evasion, the government must prove that he actually owed some tax in excess of the amount stated on his return. E.g., Koontz v. United States, 277 F. 2d 53 (5th Cir. 1960); Holt v. United States, 272

F. 2d 272 (9th Cir. 1959(. It by no means follows that, if a subsequently incurred net operating loss can be carried back to eliminate a tax liability that existed at the time the return was required to be filed, the defendant may escape conviction by reason of the fortuity of a later loss that would reduce or eliminate misstatements of tax liability fraudulent when made.

The lucky loser argument was rejected in Willingham v. United States, 289 F. 2d 283 (5th Cir. 1961), cert. denied, 368 U.S. 828 (1961). There the defendant admitted having claimed fictitious deductions during 1952 and 1953, but claimed, inter alia, that he should nevertheless be acquitted because a loss carryback from 1955 eliminated the 1953 liability. The court found that, although the Defendant was entitled to deductions, he was not relieved from criminal liability.

The court stated:

> A taxpayer may not, with impunity, willfully make false deductions in an attempt to evade the 1953 tax, and which has the actual effect of reducing the tax imposed for that year, after taking into account all deductions that are then available, whether claimed or not, because fortuitously in 1955 a loss occurs, which for tax purposes can be carried back to wipe out the 1953 liability.
>
> We think the crime is complete when with willful intent, a false and fraudulent return is filed for a year as to which, with all benefits arising out of events up to that time taken in his favor, there would still be a tax due by him but for the fraud. ...Any adjustment that may be permissible resulting from subsequent losses does not prevent the fraud committed in 1953 from being an attempt to 'evade or defeat any tax imposed by this chapter.'

289 F. 2d at 288.

Appellant's distinction of Willingham is not persuasive. He argues that here the operating losses had accrued prior to the filing of the returns, and that he was entitled to show all deductions available at the time

of actual filing, rather than at the time filing was required. Even if that were the case, it would save defendant only as to the second count. The 1972 return was filed on March 22, 1974, and the corporation's fiscal year did not end until August 31, 1974. A net operating loss sustained by a Subchapter S corporation does not become available to a shareholder until the corporation's taxable year which produces the loss has ended. 26 C.F.R. § 1.1374-1(b)(2) (1981). Whether there sould, indeed, be any loss at all for the year could not be ascertained until the year had fully run. It was therefore impossible to know whether there would be a net operating loss until a date well after the 1972 return was filed.

Appellant seeks unavailing solace in 26 U.S.C. § 1374(c) which deals with allocation

between a prior and a subsequent owner of a Subchapter S corporate loss. The loss for any year is prorated, based on the number of says during the year each owned the stock. However, that determination too can only be made after the full year is completed and the amount of the loss, if any, ascertained. While a seller may know immediately, if the sale takes place one month into the year, that the fraction of any loss which may eventually be attributable to him will be 31/35ths, nevertheless, he must wait until after the passage of the 365th day to know the amount to be multiplied against the fraction, and indeed to know whether there will be any loss whatever to which the fraction may be applied. Cf. 26 C.F.R. § 1.1374-1(b)(2) (1981), supra ("The deduction allowed shareholders by section 1374 (b) is a deduction for the taxable year

of the shareholder in which or with wich the taxable year of the corporation ends. . . .").

More to the point, the actual time of filing is irrelevant. In Manning v. Seely Tube & Box Co., 338 U.S. 561 (1950), the IRS assessed a deficiency against defendant corporation for 1941. When the corporation filed its 1943 return, it had a net operating loss which, when carried back, wiped out the tax liability for 1941. The Supreme Court held that, notwithstanding the abatement of the 1941 deficiency, the interest assessed on the deficiency was unaffected. The Court stated:

> From the date the original return was to be filed until the date the deficiency was actually assessed, the taxpayer had a positive obligation to the United States: a duty to pay its tax.

Id. at 565 (emphasis added). Similarly, in the present case, as of the date when the 1972 and 1973 returns were "to be filed"

(i.e. April 15, 1973 and April 15, 1974, resectively) appellant had an obligation to pay the tax due. The fact that subsequent operating losses would have permitted him to file an amended return and obtain a refund did not permit him to bypass the requirement of timely filing of a return indicating his income as of the date he was required to file. See also Simon v. Commissioner, 248 F. 2d 869 (8th Cir. 1957) (1943 tax became due and payable on date 1943 return was required to be filed; subsequent operating loss subject to carryback did not relieve taxpayer from penalty for deficiency assessed based on 1943 return).

Appellant's interpretation of the net operating loss carryback provisions would create an enormous opportunity for abuse. Under his view, a taxpayer could simply falsify a return and refrain from claining a net operating loss until the commencement of a tax evasion

prosecution. If no prosecution occurred, the taxpayer would be free to carry the loss forward, getting a second benefit since by falsifying his return he would have eliminated the need to apply the loss to a prior year as it should have been. Moreover, a sufficiently wealthy taxpayer with no available net operating loss could fraudulently understate his tax liability, and only in the event of a tax evasion prosecution, purchase a corporation with accumulated losses, to apply to the wiping out of his prior tax liability, and therefore his criminal liability.

Appellant was, of course, entitled to argue that he truly believed, even if his belief was erroneous, that he owed no taxes, in order to prove his lack of intent to evade tax liability. The district court permitted him to testify extensively as to the losses, and instructed the jury to consider the testimony

only on the issue of intent. In view of his failure to claim the losses on the 1972 and 1973 returns, or any amendments thereto, it is not surprising that the jury found the requisite intent to evade taxes. We find no error in the district court's treatment of the evidence of net operating losses.

II.

Appellant next contends that the admission of the government's summary chart and some of the explanatory testimony of the government's witness, David Bayha, were erroneous. The use of the summary charts in tax evasion trials is within the trial court's discretion. United States v. Meriwether, 486 F. 2d 498 (5th Cir. 1973), cert. denied, 417 U. S. 948 (1974). The charts are admissible only if they are "based upon and fairly represent competent evidence already before the jury." United States v. Conlin, 551 F. 2d 534, 538 (2d Cir.

1977), cert. denied, 434 U.S. 831 (1977). See also United States v. Moody, 339 F. 2d 161 (6th Cir. 1964). An appellate court will reverse a conviction due to erroneous admission of the charts only if the defendant shows that he was prejudiced. United States v. Meriwether, supra. Cf. United States v. Conlin, supra (erroneous admission of chart did not deprive defendant of fair trial).

With the exception of certain typographical errors, all of the figures listed in the summary chart were based upon evidence before the jury. The typographical errors in the chart were clearly identified and corrected by Bayha at trial, so appellant was not prejudiced. There was no error in the admission of the summary chart.

Appellant argues further that he was prejudiced by Bayha's testimony that the United Innkeepers corporate tax return was irregular.

The argument has no merit. The district judge sustained an objection to the testimony on the ground that it was appropriate for rebuttal, but not for the case in chief. The testimony was clearly relevant and material, since defendant's claim that he had no tax liability rested on the premise that the United Innkeepers returns were accurate. Bayha, as an expert witness, was competent to testify on the matter. It was within the judge's discretion to defer consideration of the matter until defendant had raised the defense, but there was no error in permitting Bayha to testify on the matter.

Accordingly, we affirm.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA

V.

Criminal No. 80-00005-E
Violation: 26 United States Code Section 7201

ROBERT E. KELTNER

I N D I C T M E N T

The Grand Jury charges:

COUNT I

That on or about March 22, 1974, in the Northern District of West Virginia, ROBERT E. KELTNER, a resident of Parkersburg, Wood County, West Virginia, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1972 by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the Nor-

thern Judicial District of West Virginia a false and fraudulent income tax return, which was filed with the Internal Revenue Service, wherein he stated that his taxable income for said calendar year was the sum of ($922.82) and that the amount of tax remitted thereon was the sum of $196.75, whereas, as he then and there well knew, his taxable income for the said calendar year was the sum of $25,709.12 upon which said taxable income he owed to the United States of America an income tax of $7,484.62.

In violation of Section 7201, Internal Revenue Code; 26 U.S.C., Section 7201.

COUNT II

That on or about July 4, 1975, in the Northern Judicial District of West Virginia, ROBERT E. KELTNER, a resident of Parkersburg, Wood County, West Virginia, did wilfully and

knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1973 by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the Northern Judicial District of West Virgina a false and fraudulent income tax return, which was filed with the Internal Revenue Service, wherein he stated that his taxable income for said calendar year was the sum of $2,376.00 and that the amount of tax due and owing thereon was the sum of $792.00, whereas, as he then and there well knew, his taxable income for the said calendar year was the sum of $88,691.35, upon which said taxable income he owed to the United States of America an income tax of $42,746.46.

In violation of Section 7201, Internal Revenue Code; 26 U.S.C., Section 7201.

A true Bill:

s/s Wayne J. Simmons
Foreman

s/s Stephen G. Jory
United States Attorney

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.
Attest: Thomas F. Stafford
Clerk, U.S. District Court
Northern District of West Virginia

UNITED STATES DISTRICT COURT FOR NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,

VS. DOCKET NO.: CRIMINAL 80-00005-E (H)

DEFENDANT: ROBERT E. KELTNER

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO-245 (6/74)

COUNSEL: In the presence of the attorney for the government the defendant appeared in person on this date: May 20, 1980, WITH COUNSEL: ORVILLE L. HARDMAN.

PLEA NOT GUILTY.

There being a verdict of: GUILTY.

FINDINGS & JUDGMENT: Defendant has been convicted as charged of the offense of: wilfully and knowingly attempting to evade and defeat a large part of the income tax due and owing by him to the United States for the Calendar years 1972 and 1973 as charged in Counts I and II respectively of the Indictment, in violation of Section

7201, Internal Revenue Code;
T 26, U.S.C., Section 7201.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative:

SENTENCE OR PROBATION ORDER:

on each count to a term of FIVE (5) YEARS incarceration and a fine in the amount of TEN THOUSAND ($10,000.00) DOLLARS. The sentence of imprisonment and fine are concurrent.

SPECIAL CONDITIONS OF PROBATION:

Upon motion by the Defendant, the Court stayed the execution of sentence pending appeal and without objection by the United States, the Court ordered that the conditions of bond remain in effect to ensure the defendant's continued appearance before this Court.

U. S. DISTRICT COURT

FILED AT ELKINS, W. VA.

JUN 2, 1980

THOMAS F. STAFFORD

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

COMMITMENT RECOMMENDATION

SIGNED BY: U.S. DISTRICT JUDGE

s/s CHARLES H. HADEN, II

Date: 6/2/80

CERTIFIED AS A TRUE COPY
ON THIS DATE: 6/2/80
BY s/s RUTH M. PUGH
DEPUTY

CERTIFICATE OF SERVICE

The undersigned attorney, ORVILLE L. HARDMAN, counsel for the Petitioner, ROBERT E. KELTNER, in the above-styled action, hereby certifies that on the _____ day of _____, 1982, he served the foregoing and hereunto annexed PETITION FOR WRIT OF CERTIORARI and APPENDIX, on the following named parties, via the United States Postal Department, postage prepaid:

JOHN F. MURRAY, ESQUIRE
Acting Assistant Attorney General
Tax Division
ATTENTION: MICHAEL L. PAUP, ESQUIRE
Chief, Appellate Section
Tax Division
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Washington, D.C. 2050

STEPHEN G. JORY, ESQUIRE
UNITED STATES ATTORNEY
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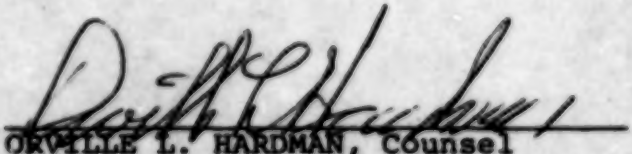
WHEELING, WEST VIRGINIA 26003

WILLIAM K. SLATE, II
CLERK, UNITED STATES COURT OF APPEALS
TENTH AND MAIN STREETS
RICHMOND, VIRGINIA 23219

SOLICITOR GENERAL
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

Given under my hand this _____ day of

_____, 1982.



ORVILLE L. HARDMAN, Counsel
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